UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-01789 (Substantively Consolidated SIPA)

- x

In the Matter of:

BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

Debtor.

- x

Adv. Case No. 10-03635-cgm

- x

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

Plaintiffs,

v.

UNION BANCAIRE PRIVEE, UBP SA et al.,

Defendants.

- x

Adv. Case No. 10-03636-cgm

- x

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

Plaintiffs,

v.

UNION BANCAIRE PRIVEE, USP SA et al.,

Defendants.

- x

Adv. Case No. 11-02540-cgm

- x

IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF TRUST,

Plaintiffs,

v.

LION GLOBAL INVESTORS LIMITED,

Defendant.

- x

Adv. Case No. 12-01194-CGM

- x

IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF TRUST,

Plaintiffs,

v.

KOOKMIN BANK,

Defendant.

- x

United States Bankruptcy Court

355 Main Street

Poughkeepsie, NY 12601

October 19, 2022

10:00 AM

B E F O R E :

HON CECELIA G. MORRIS

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re 10-03635-cgm Doc# 858 Notice of Adjournment of Hearing RE: Pre Trial Conference; hearing not held and adjourned to 10/19/2022 at 09:00 AM at Videoconference (ZoomGov) (CGM)

HEARING re 10-03635-cgm Doc# 944 Notice of Adjournment of Hearing RE: Hearing to consider the Letter Requesting a Pre-Motion Discovery Conference Filed by David Elsberg on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof (related document(s)938); hearing held and adjourned to 10/19/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM) .

HEARING re 10-03635-cgm Doc# 945 Notice of Adjournment of Hearing RE: Hearing to consider the Letter Requesting a Pre-Motion Discovery Conference Filed by Jeff E. Butler on behalf of Dexia Banque International a Luxembourg (related document(s)940); hearing held and adjourned to 10/19/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM) .

HEARING re 10-03636-cgm Doc# 985 Notice of Adjournment of Hearing re: Pre-Trial Conference; Hearing not held and adjourned to 10/19/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM) (DuBois, Linda).

HEARING re 10-03636-cgm Doc# 1025 Notice of Adjournment of Hearing RE: Hearing to consider the Letter Requesting a Pre-Motion Discovery Conference Filed by David Elsberg on behalf of Fairfield Lambda Limited (In Liquidation), Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof, Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof. (related document(s)1004); hearing held and adjourned to 10:00 AM at Videoconference (ZoomGov) (CGM)

HEARING re 10-03636-cgm Doc# 1026 Notice of Adjournment of Hearing RE: Hearing to consider the Letter Requesting a Pre-Motion Discovery Conference Filed by Jeff E. Butler on behalf of Dexia Banque International a Luxembourg. (related document(s)1006 ; hearing held and adjourned to 10/19/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM).

HEARING re 11-02540-cgm Doc# 108 Motion to Dismiss Adversary Proceeding / Motion and Notice of Motion to Dismiss the LGI Complaint (Barak, Ehud)

HEARING re 11-02540-cgm Doc# 119 Opposition /Trustee's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint (related document(s)108) filed by Robertson D. Beckerlegge on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff.

HEARING re 11-02540-cgm Doc# 122 Reply to Motion / Defendant Lion Global Investors Limiteds Reply in Further Support of its Motion to Dismiss the Complaint (related document(s)108) filed by Ehud Barak on behalf of Lion Global Investors Limited.

HEARING re 12-01194-cgm Doc# 77 Motion to Dismiss Case filed by Richard A. Cirillo on behalf of Kookmin Bank with hearing to be held on 6/15/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM) Responses due by 5/6/2022,. (Attachments: # 1 Exhibit Complaint # 2 Exhibit Complaint Ex. A # 3 Exhibit Exhibit to Complaint 1/5 # 4 Exhibit Exhibit to Complaint 2/5 # 5 Exhibit Exhibit to Complaint 3/5 # 6 Exhibit Exhibit to Complaint 4/5 # 7 Exhibit Exhibit to Complaint 5/5 # 8

Exhibit Ex. C to Complaint)

HEARING re 12-01194-cgm Doc# 92 Notice of Adjournment of Hearing RE: Opposition /Trustees Memorandum of Law in Opposition to Defendant Kookmin Banks Motion to Dismiss (related document(s)77) filed by Eric R Fish on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC; hearing not held and adjourned to 10/19/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM).

HEARING re 12-01194-cgm Doc# 93 Reply to Motion filed by Richard A. Cirillo on behalf of Kookmin Bank.

Transcribed by: Sonya Ledanski Hyde

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NICOLE SERRATORE

ELLIOT STEVENS

P R O C E E D I N G S

THE COURT: Good morning, everyone. Excuse me. It's the fall allergy season. The first one I have on today is the two adversary proceedings in Fairfield. Adversary Proceeding 10-03635, Fairfield Sentry v. Union Bancaire Privee, UBP SA et al, and 10-03636, Fairfield Sentry Limited et al v. Adler and Co., Privatbank AG, et al.

State your name and affiliation.

MR. ELSBERG: This is David Elsberg from Selendy Gay Elsberg representing the liquidators, Your Honor. And with me is my associate, Amy Nemetz.

MS. NEMETZ: Good morning, Your Honor.

THE COURT: Good morning.

MR. BUTLER: Good morning, Your Honor. I'm not sure which of the various defendants is at issue here, but I am one of them. It's Jeff Butler from Clifford Chance representing one of the defendants --

THE COURT: Which one?

MR. BUTLER: Banque International Luxembourg.

THE COURT: Banque International Luxembourg. That one is Ms. Elsberg? That one is which one.

MR. ELSBERG: Your Honor, Amy Nemetz is going to be handling this conference.

THE COURT: Just let me know which one. That's all I need to know.

MR. ELSBERG: It should just be BIL.

THE COURT: Okay. Give me a second. Which adversary proceeding? Give me the number.

MS. NEMETZ: Your Honor, it's 10-3635 and 10-3636.

THE COURT: Okay. I already said that.

MS. NEMETZ: Yes.

THE COURT: And Mr. Butler -- and he said he didn't know which one he was dealing with. So which one is he dealing with?

MR. BUTLER: I'm sorry, Your Honor. There are numerous defendants in that case, and I'm not familiar if there might be other disputes arising from the same two matters. I am here to speak about the proposed 30(b)(6) deposition that the liquidators are seeking on the subject of document retention. We discussed this at the last conference, and Your Honor put in --

THE COURT: So you're on both of them. That's correct. And it's for -- and you're representing Luxembourg. Okay. I did not understand when you said you didn't know what you were dealing with.

MR. BUTLER: My apologies, Your Honor.

THE COURT: If you don't, I don't.

MR. BUTLER: With such a large group, I never know exactly what matter is up, Your Honor. And so I apologize.

THE COURT: Okay. This is the only matter we have

today. The only matter we really have is basically -- and you wrote a letter asking for a discovery conference, ordered a meet and greet. And you're in jurisdictional discovery. This is jurisdictional discovery. So -- and you -- and from what I've been reported is that you don't have searchable email boxes.

So we are here today because, Ms. Nemetz, you are the one that needs a Rule 30-whatever number, someone from the company to testify or to -- deposition, correct?

MS. NEMETZ: That's correct, Your Honor. We also asked that BIL produce a very limited scope of documents relevant to the spoliation issues in our Rule 30(b)(6) notice. BIL has also asked this Court to grant them a protective order against the deposition, which we believe should be denied.

And then finally, the liquidators would like leave to move under Rule 37 for remedies related to the spoliation issue once the deposition is completed.

THE COURT: Okay. So that's your request today. It's a very simple, straightforward request. And, Mr. Butler, your response to basically --

MR. BUTLER: Our position is essentially since the last conference, we've had two in-person meet and confers with Ms. Nemetz and her colleagues that have focused on what documents are available in the bank that may be relevant to

the issue of personal jurisdiction.

And to be honest, we have identified some additional documents. Those discussions are ongoing. In my mind, they're not complete yet. We certainly haven't refused to produce any of the pockets of documents that we've identified that may be relevant. So this is really not an issue about document production as it relates to records available within the bank concerning the one redemption that is at issue in the case. I think that we've had very civil and productive conversations about that, and we have been very open, we believe, about what documents exist that may be relevant to the issue of personal jurisdiction.

This 30(b)(6) request -- and our motion for protective order is just the flip side of that. We're trying to not have that 30(b)(6) deposition at this time. We think it's really a different issue. It's an attempt to build a spoliation case against the bank, arguing that we did not do things back in 2008 or 2010 that we should have done. In my mind, that is more of a merits discovery issue. It may be appropriate to do this type of deposition at some point in the case. But during this phase of limited personal jurisdiction discovery, it really is a bridge too far, especially when we are being as cooperative as we can, we think, with producing the documents that continue to

exist within the bank relating to the issue of personal jurisdiction.

And that's not an insignificant number of documents, Your Honor. It doesn't include everything that the liquidator would like to have, but it does include hard copies of emails, which is the way the bank kept emails back at that time. I was a different era, Your Honor. Everything was done by facsimile. And to keep records within the bank, they just printed out copies of emails and put them in a file, which has been retained and has been produced to the liquidators.

There are various other documents that are available like the account statements relating to this redemption, the agreements with the particular customer on whose behalf the bank made this redemption. All of those are available for production. And, frankly, once we produce those, we will have completed not only personal jurisdiction discovery, but pretty much all the discovery in terms of documents that the bank will be able to provide in this case.

So under those circumstances, we do not think a Rule 30(b)(6) deposition concerning what was done after this case was filed to preserve and collect documents is necessary or appropriate, and it should await a decision from this Court on whether there is personal jurisdiction

before that kind of discovery proceeds.

THE COURT: Okay. Ms. Nemetz, what discovery have you already received?

MS. NEMETZ: So we have received a limited hard copy packet of emails that, as Mr. Butler stated, were printed off at various points in time and preserved. And we've also received additional --

THE COURT: I'm going to stop you right there.

MS. NEMETZ: Yes.

THE COURT: Limited is an editorial word. So how can you say it's limited? Tell me what you really mean.

MS. NEMETZ: So there are a few dozen emails that were produced in hard copy by BIL. The liquidators have subsequently located separate email communications that were produced by third parties that show relevant individuals at BIL not only engaging in additional emails that BIL did not produce, but they are key emails with individuals at FGG trying to get their contact information or they involve relevant individuals at the bank receiving, offering memoranda, or other diligence materials.

And BIL, based on what we know to date, which I can explain to Your Honor if you would like, didn't even try to preserve that information. So we know that what they've given us is only a subset of what once existed.

MR. BUTLER: Your Honor, if I may just respond to

those two emails. I received copies of those emails for the first time last night. They have not been provided previously, despite having a number of in-person meet and confers on this topic.

I respectfully disagree based on my examination of them. One of the emails has nothing to do with the redemption at issue in this case. The other one I believe, at least large portions of it, was part of the file that we produced in hard copy form. So it's consistent with what I understand from interviews and discussions with my clients and the people involved that the practice was to print off key emails -- this was back in 2007, Your Honor, so many, many years ago -- and keep them in the back office file which has been provided to the liquidators.

THE COURT: Okay. This is all still seemingly personal jurisdiction to me, and it seems that you're minimizing when you have BCC copies from other entities. Okay. All right. What else?

MS. NEMETZ: So, Your Honor, based on the discussions that we have had with Mr. Butler to date, we do know some information about BIL's practices. And those practices indicate that significant electronic evidence was not preserved by the bank. So we know that BIL didn't even issue a litigation hold related to the Fairfield funds until November 2010. We know that BIL employees, including the

ones who did actually receive the litigation hold, were permitted to freely delete information from the bank's systems even after the hold was issued. We know that BIL took no steps at an institutional level to save down relevant information --

THE COURT: Okay. Now we're talking about personal jurisdiction. And you're saying that these emails go to personal jurisdiction.

MS. NEMETZ: Absolutely, Your Honor.

THE COURT: Okay.

MS. NEMETZ: There were -- we know that there was evidence relevant to personal jurisdiction. We've provided Mr. Butler with examples of what we have been able to cobble together from third parties that would demonstrate the context between BIL and the United States. So the information existed and there's no question that BIL failed to keep it.

MR. BUTLER: Your Honor, respectfully, that's pure speculation.

THE COURT: If you would wait, Mr. Butler. Let me ask her a question.

And this is whether they directed their intentions to New York on their -- on what they were doing?

MS. NEMETZ: Yes, Your Honor.

THE COURT: With respect to United States. Yeah.

MS. NEMETZ: Right. So the two emails that we found, one of them shows one of the six employees at the bank that BIL has identified to be relevant to this redemption in this case. She sends an email to Citco asking for the contact information of two individuals at FGG, Fairfield Greenwich Group, which was the manager of the funds. She gets that contact --

THE COURT: And you got this through Citco. How did you get this information?

MS. NEMETZ: Correct. It was produced in another litigation involving Citco, and I believe that we received that document production.

THE COURT: Okay. Okay. Now then, Mr. Butler, what do you have to say?

MR. BUTLER: Well, with respect to that specific email, which I saw for the first time this morning, it's a 2006 email. So it does not relate to the 2007 redemption at issue in this case. And it's important to understand I guess a bit of background.

There's one redemption that's at issue in this case. The Fairfield liquidators also sued my client, Dexia BIL, in another case for redemptions that they made not through Citco, but directly in their own name. And there were a number of transactions that fit into that category, but that separate case has been dismissed with prejudice.

And that dismissal has been affirmed now at least once on appeal. So those redemptions are not at issue in this case. And we have from the beginning of discovery in this case drawn a line between documents that relate to the particular redemption in this case and redemptions that were made in -- the other redemptions --

THE COURT: I think that's for me to decide.

MR. BUTLER: -- as part of that other case that has been dismissed.

THE COURT: I think that's for me to decide, Mr. Butler, about the --

MR. BUTLER: Well, Your Honor, that may be the case. But I think it would require a motion from the liquidators, which we haven't even discussed --

THE COURT: Okay, then we can file a motion. That's exactly where I am today.

MR. BUTLER: Okay.

THE COURT: I'm going to permit the liquidators to file a 37(a) motion for an order compelling discovery or disclosure. So then you can look at it.

MS. NEMETZ: Your Honor, so to clarify, I'm not sure that Mr. Butler can state as a factual matter --

THE COURT: I can't, either. You filed your motion.

MS. NEMETZ: Right. So this is why we need a

30(b)(6) deposition, Your Honor. Because we need someone to tell us what was kept, why, whether BIL acted reasonably under the circumstances.

THE COURT: I agree.

MS. NEMETZ: I think Mr. Butler has confirmed that there is nothing left in his client's possession for us to compel discovery of. He doesn't have anything else.

MR. BUTLER: I would say we've produced everything that exists, but I agree --

THE COURT: I hear you, Mr. Butler. But you don't have somebody from the company telling them that. So I don't need you testifying to this. I need you -- that's -- I need a 30(b)(6) motion and I need a 37(a) motion. Let's get this moving along. Run the motions. I'll answer when you get there. You lay it out for Mr. Butler.

MS. NEMETZ: Okay. So, Your Honor, to clarify --

THE COURT: I'll give you both --

MS. NEMETZ: I'm sorry?

THE COURT: I'll give you both -- I'll let you file both motions. Let's move it.

MS. NEMETZ: Okay. Thank you very much, y h.

THE COURT: (indiscernible) isn't really a motion. Okay.

MR. BUTLER: I understand, Your Honor. So we'll -- they'll file the motions. We'll get an opportunity to

respond, and we'll go from there.

THE COURT: Not on the 30(b)(6). I don't think you have to have a motion on 30(b)(6). You just have --

MR. BUTLER: Okay. Then we'll proceed with the 30(b)(6) deposition and the liquidator can decide what to do on a Rule 37 motion.

THE COURT: Exactly.

MR. BUTLER: Understood, Your Honor. Crystal clear.

MS. NEMETZ: And, Your Honor, we also asked that the Court impose a deadline by which the document production and deposition take place just so that we can keep this moving. I think you proposed October 31st.

THE COURT: You know I like to move it. So how quickly?

MR. BUTLER: Your Honor, the challenge with the 30(b)(6) is I have to prepare a witness in Luxembourg. They're quite unfamiliar with this procedure. So I would request --

THE COURT: Well, you've had a lot of time to talk to them. You've been asking them for these -- it's been months.

MR. BUTLER: True.

THE COURT: So it seems to me preparing a witness isn't going to take that long. You just need the CIO or

somebody at a higher rank that can tell you what went on and can put their hands on stuff.

MR. BUTLER: And that person, y h, after more than ten years, is going to have to do a certain amount of their own investigation in order to do a proper job --

THE COURT: It sounds to me like you haven't asked them before then if that's what you're saying, Mr. Butler. And I don't think you want to say that to me.

MR. BUTLER: I did not mean to give that impression. There's been a lot of work done by me --

THE COURT: You did give that impression. You did give that impression.

MR. BUTLER: I am sorry, Your Honor, if I did give that impression.

THE COURT: Okay.

MR. BUTLER: Your Honor, I respectfully request that we do this within a month, but that --

THE COURT: Okay. Come back and talk to me -- come back and tell me what you all are doing on December the 145th.

MR. BUTLER: Thank you, Your Honor.

THE COURT: And I think you should have had the depositions before -- or try to have them before November the 15th. Let's move this along.

MR. BUTLER: Thank you, Your Honor. We'll get

that done.

THE COURT: Thank you. Anything else on Fairfield?

MS. NEMETZ: Your Honor, I just want to clarify that --

THE COURT: Sure. We're going to move fast. We're going to move fast.

MS. NEMETZ: Thank you. So Mr. Butler and BIL are going to produce the documents requested in our 30(b)(6) notice, which go to the issues that we need to discuss and the eventual motion we will file.

THE COURT: In 21 days they're going to produce them. (indiscernible) tell you who you are going to depose, and it may take a little more than 21 days for that to happen, but you will know who you are going to depose and who you are going to be talking to.

MS. NEMETZ: Thank you, Your Honor.

THE COURT: Mr. Butler has now reassured me that he has been talking to the company and he knows what's going on in the company. So I've been reassured of that on the record.

MS. NEMETZ: And so we'll do the deposition by November 15th.

THE COURT: I don't know that you'll get the deposition by November 15th. You'll get the information and

you'll get who is going to be at the deposition, and you will be able to schedule it.

MS. NEMETZ: Okay. I appreciate that, Your Honor.

THE COURT: So I would love to have it done by November the 15th, but that's pushing for all of you to be in Luxembourg and back from Luxembourg and have the information you need in order to do a deposition. But you all are going to report back to me on December the 14th just to give me an update on what's going on.

MR. BUTLER: Thank you, Your Honor.

MS. NEMETZ: Thank you, Your Honor.

MR. ELSBERG: Thank you, Your Honor.

THE COURT: And that's a long time. Thank you. Very good. Now then I am into -- thank you, everyone, on Fairfield.

Now we're into 11-02540, Picard v. Lion Global Investors Limited. State your name and affiliation.

MR. GORKIN: Good morning, Your Honor. Russell Gorkin from Proskauer Rose on behalf of the Defendant, Lion Global Investors Limited, which I will refer to today during my presentation as LGI as we did in our papers.

MR. BECKERLEGGE: Good morning, Your Honor. Rob Beckerlegge from Baker and Hostetler for the Trustee.

THE COURT: Very good. This is your motion to dismiss, Mr. Gorkin.

MR. GORKIN: Yes. Thank you, Your Honor.

As you know, last week we wrote to the Court along with Mr. Beckerlegge to let you know that the parties do not intend to spend time today arguing any grounds for dismissal that are not unique to LGI and which the Court has already addressed in the context of other proceedings where the issues are essentially identical.

But LGI was not willing to enter into a stipulation to forego oral argument altogether, as several other defendants have done, because to our knowledge no other defendant in any other adversary proceeding faces a situation remotely like the one LGI does here.

And the situation I am referring to is that the Trustee's filed a complaint asserting certain jurisdictional allegations to LGI but has now admitted that none of the essential allegations needed to find jurisdiction over LGI are actually true. None of them.

And so I want to walk through each of those disavowed allegations in a moment and we'll address the significance of what the Trustee is now attempting to do in his opposition brief.

But before going there, I want to just briefly touch on another issue that's lurking in the background because it's important. And that issue is the fact that the Trustee filed his complaint more than 11 years ago,

something the adversary proceeding number provides a stark reminder of each time an ECF notification is filed. And what that means is that LGI has been subject to these proceedings for the past 11 years which have gone up and down the federal court system while the Trustee has known all along that the allegations he asserted and which were necessary for this Court or any American court to exert jurisdiction over LGI were false.

Now, fortunately, LGI has been able to somewhat manage the time and resources devoted to this matter because other defendants over whom personal jurisdiction this Court has found to exist and who did subscribe to and buy shares in Fairfield Sentry have mostly taken the lead on addressing issues common to all defendants when your predecessors decided to bifurcate common issues like comity and extra-territoriality and address those first before turning to Defendant's specific arguments.

But this case was remanded for Defendant's specific proceedings on October 27th, 2020, almost exactly two years ago. And since then, the Trustee has not once sought to amend his complaint to remedy what he has long known are false allegations. And when LGI filed its motion to dismiss back in April, six months ago, explicitly drawing the Trustee's attention to the false allegations asserted in his complaint, he still did not seek to amend his complaint

as he could have done under Federal Rule of Procedure 15(a)(1)(B), made applicable by Federal Rule of Bankruptcy Procedure 7015. Instead, the Trustee filed an opposition brief agreeing with LGI that the allegations he had asserted against it were false, but arguing that the falsity of those allegations apparently doesn't matter because he has a whole other set of allegations based on the conduct of other entities, none of which are so much as even mentioned anywhere in the complaint.

Now, as we explained in our reply brief, the Trustee is wrong legally. And I'll tell you why in a moment. But even if this Court were to disagree with my argument as to why his new contentions are still legally insufficient, as a matter of procedure, how can this case possibly move forward unless and until the Trustee makes a motion to amend his complaint.

LGI obviously must answer allegations set forth in a complaint, not a brief. But the Trustee has admitted all of his critical allegations are false. And if this case ever were to move into the discovery phase, how could either party determine whether document requests satisfy relevance requirements if the operative allegations the trustee intends to rely upon have not yet even been set out in a short and plain statement as the federal rules require?

So I think all of that is relevant background when

thinking about how this motion needs to be adjudicated, which I'll come back to at the end of my presentation. But right now what I want to do is turn to what's alleged in the complaint and what the Trustee has disavowed. Because the starting point for a motion to dismiss a complaint is of course the complaint itself.

Now, all of the Trustee's jurisdictional allegations are set forth in Paragraph 7 of this complaint. And the first allegation he levies there is that LGI "knowingly directed funds to be invested with New York-based BLMIS through Fairfield Sentry." But the Trustee has disavowed that allegation and admitted that LGI did not in fact direct any funds to be invested with New York-based BLMIS. And we see that right off the bat on the very first page of the Trustee's opposition brief where he writes, StrautsLion24x06 Asset Management, not LGI, "Straights Lion Asset Management is the entity that made the investment in Sentry." And we see that again at Page 11 of his opposition brief where he writes, and I quote, "Straits Lion's intentional investment with BLMIS in New York through a known BLMIS feeder fund establishes personal jurisdiction."

But as you know, Straits Lion is not the defendant here, LGI is. And that's the entity over whom the Trustee needed to plead a prima facie case of jurisdiction.

Now, the second allegation the Trustee asserted in

Paragraph 7 of his complaint is that, "By directing its investment through Fairfield Greenwich Group, Defendant, Lion Global, accepted the rights, benefits, and privileges of conducting business and/or transactions in the United States."

But again, as just shown, the Trustee has disavowed this allegation, too. And he does so even more specifically at Page 16 of his opposition brief when he writes, and I quote, "When Straights Lion first invested in Sentry, it was aware that FGG conducted key operations from its New York office."

Next, the Trustee alleges in Paragraph 7, "Upon information and belief, Defendant Lion Global entered into a subscription agreement with Fairfield Sentry providing for New York jurisdiction." This too the Trustee has admitted is false. At Pages 6 and 8 he writes, "Straits Lion subscribed $50 million into Sentry in March and April of 2005."

Fourth, the Trustee alleges in Paragraph 7 of his complaint that LGI "Sent a copy of the subscription agreement to FGG's New York Office and wired funds through a bank in New York." But LGI did not send a subscription agreement to FGG's New York office or wire funds through a bank in New York, as the Trustee admits at Page 8 of his opposition brief where he writes, "The Trustee is in

possession of records establishing that Straits Lion made subscription payments into Sentry." And that, "Straits Lion placed a total of $50 million into Sentry in multiple subscription agreements between March and April of 2005."

If the Trustee alleged that LGI "Communicated by email and telephone with Fairfield Sentry account representatives located in Fairfield Greenwich Group's New York City office and traveled to Fairfield Greenwich Group's New York City office to meet with Fairfield Sentry account representatives."

But at Page 16 of his brief, he admits that LGI did no such thing, writing, "Straits Lion, through its personnel, traveled to New York in July of 2004 to meet with FGG at FGG's New York headquarters. Straits Lion participated in 12 days' worth of meetings with FGG with multiple Straits Lion executives in attendance. FGG and Straits Lions personnel spent a significant amount of time together."

And it continues on Page 17, writing, "Mr. Tong Foo Cheong of Straits Lion communicated with Mr. Blum of FGG in New York." And that there were "Additional communications between Straits Lion and FGG personnel."

So in other words, according to the Trustee, Straits Lion, a separate legal entity, not LGI, the Defendant in this action, established contacts with New

York.

Now, the Trustee attempts to reconcile his admissions that LGI has not itself made any contacts with the United States or New York by grouping it into the "Lion Family" of entities. And you see that right on the first page of his brief. He writes, "This Lion family of entities and successors, including Defendant, purposely availed themselves of New York law by engaging with the Fairfield Greenwich Group in New York to not only invest in Sentry, but also to establish a joint venture to sell FGG products, including Sentry, in Asia."

But even if this statement had been asserted as an allegation in his complaint, which it was not, it would still not establish jurisdiction over LGI because group pleading is not permitted and jurisdiction must be established over each individual defendant. And the Trustee has disclaimed any argument that any of the other Lion Family's member's contacts with New York, which are all he talks about, can be attributed to LGI. The Trustee makes this explicit at Page 14 of his opposition brief, writing, "He is not alleging jurisdiction exists over LGI due to alter ego liability, imputation, or happenstance."

So the hodgepodge of contentions that the Trustee now throw out in his opposition brief about other Lion Family members and whether employees of Straits Lion also

might have later worked at LGI at some point and all the rest are all legally irrelevant according to the Trustee himself.

In fact, in case there was any doubt that the Trustee has not established a prima facie case of jurisdiction over LGI based on his complaint, he leaves no doubt when he writes, and I quote, "Here, Straits Lion --" not LGI, "Straits Lion knowingly and purposefully directed activity into New York."

Now, the only allegation asserted in Paragraph 7 that the Trustee arguably still stands by is that LGI "Knowingly received transfers from BLMIS by withdrawing money from Fairfield Sentry."

Now, as an initial matter, that's just factually wrong. James Peng, LGI's COO, submitted a sworn declaration and testified in Paragraph 8 therein that LGI "was not a party, either as principal or as agent for others, to the transactions that are the subject of the complaint." That, "LGI has never been a member or shareholder in Sentry and that LGI neither was, nor is a party to the Sentry subscription or redemptions agreements and never received, either as principal or agent, the alleged transfers Plaintiff seeks to recover in this adversary proceeding."

But second, and even more importantly, even in some other alternate universe where that allegation actually

was true, that is the only jurisdictional allegation the Trustee has left, and it is a legally insufficient basis for asserting jurisdiction over LGI.

Now, the United States Supreme Court made that crystal clear in the Helicopteros case. That's 466 U.S. 408, 416, which we cite in our opening brief, where it held that a foreign defendant's receipt of funds was "of negligible significance" and did not suffice to establish personal jurisdiction.

Now, I understand in a totality of circumstances, that might be relevant. But as I just explained, there are no other allegations here. And standing alone, it's of negligible significance.

Now, I haven't read every decision in the related proceedings that this Court has issued so far, I'll admit. But I am unaware of this Court finding personal jurisdiction based only on the mere receipt of funds and the Trustee has not cited any decision of this Court or any others where that would suffice, either.

Now, at Page 16 of his opposition brief, he does suggest that this Court's opinion in Picard v. BNP Paribas provides that withdrawal of funds from Sentry alone would be a sufficient basis to establish jurisdiction over a defendant. That's not a genuine or faithful reading of that case. And that's apparent from the face of it. There, all

of the Defendant's main offices and employees in New York and conducted business with regard to the transaction at issue through those New York-based employees and offices.

That's not the case. LGI has never had an office or other place of business or employee located in the United States, as Mr. Peng testified at Paragraph 6 of his declaration, and the Trustee does not contend otherwise.

Unlike all of the other cases this Court has adjudicated and found personal jurisdiction to exist thus far, there is simply no allegation sufficient to exert jurisdiction over the Defendant here.

For example, in the published Multi-Strategy decision, that's 0881789 ECF Number 21729 at Pages 6 to 8, this Court found jurisdiction existed because the Trustee devoted over five pages to the Defendant's specific contacts with New York. Here, we have one paragraph and the Trustee has expressly disavowed the crucial jurisdictional allegations contained therein.

Likewise, in Bank Hapoalim, Adversary Proceeding 12-01216 at *7, this Court wrote, "In response to the motion to dismiss, the Trustee provided the subscription agreements entered into by the Defendants, "And on that basis concluded altogether the subscription agreements combined the Trustee's allegations are sufficient to constitute a prima facie showing of jurisdiction."

Here, the Trustee admits LGI did not enter into any subscription agreements. Instead, he contends that Straits Lion did. A unlike in Hapoalim, he has not even submitted any of those subscription agreements, either.

And one last example is Bank Syz. That's Adversary Proceeding 11-2149. In that case, the Trustee alleged that the named defendant maintained its own account directly at BLMIS and even filed a customer claim in the SIPA proceeding, voluntarily and purposefully availing itself of New York's and the United States' laws with respect to BLMIS funds. None of that has happened here, and the Trustee does not contend otherwise. So we know that the complaint does not establish jurisdiction over LGI.

Now, in connection with his opposition brief, the trustee filed a declaration through Mr. Beckerlegge, attaching some exhibits. And LGI recognizes that a Plaintiff may submit affidavits and supporting materials containing an averment of facts that, if credited, would suffice to establish jurisdiction over the Defendant.

So what are the relevant averment of facts that the Trustee has asserted through those materials to establish jurisdiction over the Defendant, LGI? He submits a printout of a website page stating that Straits Lion merged in 2008 with another entity, OCBC Asset Management, to form what became LGI and argues that as a result, there

is a successor liability basis to assert jurisdiction over LGI.

Now, first, the Trustee's contention that LGI was created in 2008 as a result of the merger between Straits Lion and another entity is demonstrably untrue. And that is not only proven by the certificates of incorporation and name changes attached as Exhibits A and B to Mr. Peng's declaration, which establishes that LGI was incorporated in 1986, but from the very exhibit the Trustee cites to, Exhibit 17 to Mr. Beckerlegge's declaration, which states in the very first sentence that LGI was "established in Singapore in 1986."

So all of the affidavits and supporting materials before the Court show that LGI was a separate, independent entity that was operating and doing its own thing in 2005 while Straits Lion, which the Trustee acknowledges was formed in 1996, was allegedly doing all of the other things the Trustee writes about now in his brief. And again, the Trustee has affirmatively and explicitly stated he is not arguing jurisdiction exists under an alter ego or imputation theory.

But even if we were to assume for the sake of argument that the Trustee's contention that those two entities merged to form LGI was true, which it's not, it doesn't even matter for present purposes because the Trustee

has failed to make a prima facie showing that that fact provides this Court with a legal basis to establish jurisdiction over LGI. And that is because the determination as to whether Straits Lion's alleged contacts with the forum can be attributed to LGI under a successor liability theory is a question governed by Singaporean law. And the Trustee has not put any Singaporean legal expert before this Court from which it can make a determination as to the significance of the fact the Trustee has now asserted. That is not only established by the Energy Intelligence Group Incorporated v. Cowen case cited at Page 10 of LGI's reply brief, but by the Trustee's own legal authority.

Indeed, the only case the Trustee cites in support of its successor jurisdiction argument is In re Motors Liquidation Company, 565 B.R. 275 from this Court in 2017. And that's Page 22 of his opposition. And that case also shows that whether jurisdiction may be asserted based on a predecessor's contacts and whether they may be imputed to a successor corporation depends entirely on foreign law.

Indeed, the court there made a preliminary finding that Austrian law provided a basis for it to conclude that the Austrian defendant could be hailed into court based on its predecessor's jurisdictional contacts and therefore felt comfortable moving the case forward. And that was

particularly true because the defendant there, the Austrian defendant there did not move to dismiss on successor liability grounds --

THE COURT: Do you have some Singapore law on this, Mr. Gorkin? Are you -- isn't this a Singapore -- isn't this a Singapore --

MR. GORKIN: Yes, I'm -- correct.

THE COURT: So tell me Singaporean. Don't tell me Austrian. Tell me Singapore.

MR. GORKIN: Absolutely, Your Honor. And --

THE COURT: Before we argue that, argue the jurisdiction in which this is supposedly held. So, okay.

MR. GORKIN: Exactly. And so the point, Your Honor, is that Mr. Beckerlegge and the Trustee has alleged that LGI is a successor corporation. Even if that fact is true, needs to go one step further to show the legal significance of that fact to this Court. And the only way to do that is through Singaporean law. And he hasn't done that.

THE COURT: And you haven't brought it up, either. Okay. Keep going.

MR. GORKIN: And that's a fair point. But I want to address that next.

And so what the In re Motors case shows us is two things. First, that the Trustee had to submit Singaporean

law to enable the Court to at least make a preliminary finding that Singaporean law would support this Court's exercise of jurisdiction over LGI based on successor liability theory just as the plaintiff in In re Motors needed to submit Austrian law to enable the court in that case to make such a finding. It's the trustee's burden. The Trustee did not do that here, and so he failed to carry his burden.

But second, the In re Motors case demonstrates why Plaintiffs are required to actually set forth the facts and bases for the liabilities they are claiming in a complaint and not an opposition brief. Because the plaintiff in In re Motors followed this foundational procedural rule applicable to all plaintiffs, the defendant was afforded full and fair notice of the grounds from which the Plaintiff was asserting to hold it liable, namely successor liability.

Now, the Austrian defendant ultimately decided not to move to dismiss based on those grounds, presumably because of what Austrian law provided. But here, the Trustee has not pleaded successor liability, meaning LGI did not have an opportunity to move to dismiss on those 12(b)(6) grounds. And remarkably, the Trustee asserted in his opposition brief that "LGI did not argue in its motion that it was not a successor-in-interest to Straits Lion."

But as we explained at Page 10 of our reply, of

course we did not make that argument. The Trustee had not made any such allegations. Straits Lion was not even mentioned once in the complaint.

So where does all of this leave us? Well, for the reasons discussed, the Trustee has failed to allege in his complaint a prima facie case of jurisdiction over LGI. And now he has also failed to aver facts that are sufficient to carry his burden to show that there is a prima facie case of jurisdiction over LGI.

Now, the Trustee has asked for jurisdictional discovery, but that's not appropriate here. He has disavowed all of the facts necessary for jurisdiction that he initially asserted in his complaint. And even if we were to pretend his merger of facts were correct, he has not established a prima facie case under the law. So there is no disputed fact that if proven would show that jurisdiction exists.

And so at the outset, as I said, if anything is to happen here, the first thing must be that the Trustee seek leave to file an amended complaint. The Trustee is obligated to set forth a short and plain statement alleging facts in a formal pleading, not a brief, that he contends subjects LGI to liability. He has not done that.

And as I said earlier, if this action were to move forward, how could LGI even answer a complaint when the

Trustee has admitted that all of its critical allegations, such as that LGI entered into a subscription agreement, he has admitted those are false. LGI cannot respond to a brief.

Coming back though to the fact that this proceeding was filed 11 years ago. We respectfully submit that moving forward in this manner under these circumstances would not be proper and the complaint should be dismissed with prejudice.

The Trustee has had in his possession custody or control all of the documents he has now belatedly attached to Mr. Beckerlegge's declaration years later. And how do we know this? In Paragraph 40 of his complaint, the Trustee discusses the settlement he entered into with Fairfield Sentry. And so that settlement agreement is incorporated into it by reference. LGI attached that agreement as Exhibit 6 to Mr. (indiscernible) declaration, which was filed in support of LGI's motion to dismiss. And pursuant to that agreement, the Trustee has had access to all of Sentry's books and records as of June 2011, two months before this action was even filed, and has maintained access ever since.

So what does that mean? That means the Trustee could have and should have sought to amend his complaint sometime over the past 11 years. There is no reason why it

could not have done so. LGI has been hauled into this court and other American courts in these proceedings in violation of the Constitution for 11 years and counting and has already filed its motion to dismiss, a memorandum of law, a reply memorandum of law. And we are appearing here at this argument based on the allegations the Trustee stood by up until the eleventh hour when he had completely disavowed them and pulled out a whole alternative set of allegations.

It's not equitable or reasonable under these circumstances where the Trustee has sat on his hands and these documents and allegations all of this time and permit him a redo. Thank you.

THE COURT: Thank you. Mr. Beckerlegge?

MR. BECKERLEGGE: Good morning, Your Honor. Thank you. Rob Beckerlegge from Baker and Hostetler for the Trustee.

I want to try to focus this issue -- focus this argument as much as I possibly can, and I want to tick off a few of the things that Mr. Gorkin just mentioned, specifically about all of the documents.

The Trustee, despite what Mr. Gorkin has said, has never had and probably never will have all of the relevant documents. So the Trustee has not sat on his hands. That is an argument that has been made and failed by numerous other defendants that have come before Lion.

Additionally, I want to take issue with the use of Mr. Gorkin's vernacular both today and in his brief. He repeatedly says that the Trustee has disavowed allegations or that what we allege we now claim is false or that we admit certain things.

I don't believe any of those things to be true or accurate, and I do not believe any of those things were said in our opposition brief. And so I do take issue that that is their stance, that the Trustee has admitted or disavowed anything. The Trustee stands by what he has said and what he has written.

I do think that we can focus the issue as much as possible by looking at some of the documents that were submitted attached to my declaration in opposition to their motion. Perhaps the most important exhibit, the most telling exhibit, is Exhibit 5 to my declaration. That is a Citco document. That is not the Trustee's document, that is not Fairfield's document. That is a document from Sentry's administrator reflecting that Lion Global received the redemptions from Sentry in July of 2005.

And more specifically if we look at some of the other exhibits attached to my declaration, in Exhibit 1, it acknowledges that Lion Global was formed in 2005. More specifically, we can look at Mr. (indiscernible) email in Exhibit 14 where he acknowledges that $50 million

subscription. And his bio, which is attached as Exhibit 6, reflects that he was employed by Lion Global Investors from 2001 through 2009. So all of these documents support that Lion Global received the redemptions and is the property party in 2005.

And so with those documents alone, we believe we have named the proper party.

What Mr. Gorkin seems to be arguing is that -- is not so much a personal jurisdiction issue, but more of whether we've named the proper party. The information available to the Trustee indicates such that it was the proper party. Excuse me, that Lion Global was the proper party.

In terms of the evolution of the Lion entities, Your Honor, as we understand it -- you've heard a number of references from Mr. Gorkin today to Straits Lion Asset Management. As we understand it, Your Honor, Straits Lion Asset Management became Lion Capital and subsequently was renamed Lion Global. So while I do not know Mr. Gorkin's position on Singaporean law, based on our -- based on the documents available to the Trustee, that is what we were going on.

And also Exhibits aside, I want to draw your attention to two additional things. What the argument really boils down to is are there unresolved questions of

fact. And there absolutely are unresolved questions of fact.

Now, as you heard Mr. Gorkin say -- I believe he quoted his own briefing -- that Lion Global "Never received as principal or agent the alleged transfers." I don't know exactly what "as principal or agent" means, but it sounds like very carefully-chosen lawyerese to try to avoid liability. And more specifically, it flies directly in the face of Exhibit 5, reflecting the Citco documents which reflect that the redemptions were paid to Lion Global.

And also I want to draw your attention, Your Honor, to Page 4 of their reply. They seem to get into the world of hypotheticals at that point and imply that Lion Global may have been a conduit and it may have received transfers on behalf of other entities. That sounds very much like the mere conduit affirmative defense, which is inappropriately raised on a motion to dismiss, is fact-intensive, and certainly leaves open a number of factual questions.

Again, I don't know what the phrase "might have received transfers on behalf of other entities" means exactly or how Defendants mean it. But it certainly sounds like a factual issue to be explored.

So given the allegations that we are not -- that the Trustee does not walk away from, given the allegations

that the Trustee does not disavow or otherwise now say is false, coupled with the exhibits attached to my declaration, which support a finding of personal jurisdiction, it's the Trustee's position that personal jurisdiction overlying global is reasonable.

As for the Defendant's arguments, again, it seems more a question of fact and less a fact of personal jurisdiction. And there are simply too many open questions to be resolved at this time.

With that, Your Honor, as indicated in our joint letter, the Trustee rests on the balance of his arguments unless Your Honor has any questions.

THE COURT: Mr. Gorkin, do you have anything you wish to add?

MR. GORKIN: Yes. Thank you, Your Honor.

And so first I'll address where Mr. Beckerlegge began, which is Exhibit 5. That, as Mr. Beckerlegge said, at most shows receipt. Now, again, we disagree with that as a factual matter. But we understand. We are willing to concede for the purposes of this motion when you have to construe everything in favor of the Trustee. Even assuming that's true, receipt is not a sufficient basis to assert personal jurisdiction, as I said.

Now, Mr. Beckerlegge referred to other exhibits that he attached to his declaration as well. I addressed

all of those in my presentation. All of those are about Straits Lion's contacts with New York. The Trustee has -- I read from the opposition brief. You'll take a look yourself. There's a record of this proceeding explicitly state he's not claiming alter ego or imputation. And so the sole issue here, the sole basis, what the Trustee is asserting now, belatedly, not in his complaint, never giving us an opportunity to move on 12(b)(6) grounds to dismiss on successor liability, because he pulled this out in his opposition brief, is that there's a family of entities where there's successor liability. But again, it was his burden then to introduce Singaporean law as the plaintiff did in In re Motors where even there the defendant did not even move to dismiss on that basis, yet the court still -- the plaintiff still had to put in Austrian law and the court still had to make that preliminary finding that Austrian law would permit jurisdiction to move the case forward.

And so, quite frankly, there is nothing here requiring discovery. Because even assuming all of the things that the Trustee now just says in his opposition brief -- not his complaint -- but even assuming what he says in his opposition brief are true, there is still just nothing here to establish jurisdiction over LGI.

THE COURT: Mr. Beckerlegge, let me just ask -- well, go ahead. Respond.

MR. BECKERLEGGE: Sure. Your Honor, if I might add one additional thing. I think one thing that has to be kept in mind here is there is an evolution of the relationship between Lion and Fairfield. They had a joint venture together. They formed it in 2004. Now, those contacts that were -- and there was an extensive meeting in New York. They developed an immense understanding of the way Fairfield --

THE COURT: Do me a favor, which Lion? You said Lion and you said --

MR. BECKERLEGGE: In 2004, based on what we know of, it looks like Straits Lion Asset Management employees came to New York in 2004 for meetings with Fairfield. Ultimately they formed a joint venture with a different name that incorporated both Fairfield and Lion.

THE COURT: Which Lion again? Straits Lion or...

MR. BECKERLEGGE: Straits Lion. Yes, Your Honor.

THE COURT: Or Lion Global? Okay.

MR. BECKERLEGGE: Straits Lion.

THE COURT: I have a question for you, Mr. Beckerlegge. And that is I just want you to comment on Paragraph 7 of the complaint. And that says, "In this case, the trustee has alleged legal sufficient allegation of jurisdiction simply by stating that the Debtor knowingly directed funds to be invested with New York-based BLMIS

through Fairfield Sentry. This allegation alone is sufficient to establish a prima facie showing of jurisdiction over the Defendant in the pre-discovery stage of litigation.

Now, of course you probably took that from some of my opinions. But...

MR. BECKERLEGGE: Yes, Your Honor.

THE COURT: And that isn't -- and the complaint said, "Directed funds to be invested with the New York-based BLMIS through Fairfield Sentry and knowingly received transfer of customer property from BLMIS through withdrawals from Fairfield Sentry." That's -- explain which the Defendant was in that -- tell me about this.

MR. BECKERLEGGE: Your Honor, based on -- in terms of that, we believe that Lion Global received the redemptions because of the Citco document at Exhibit -- attached as Exhibit 5. Also because of -- from their own parent company's website, we believe Lion Global existed in 2005.

THE COURT: Okay. You're sort of mixing me up with the names.

MR. BECKERLEGGE: Sure. Let me --

THE COURT: Yeah. Try to clarify it for me.

MR. BECKERLEGGE: Sure. Your Honor, we don't dispute that Straits Lion Asset Management seems to have

been the one behind the investment in 2005, March and April. And that's reflected in Exhibits 3 and 4. But in terms of the redemptions in July, we believe that those redemptions were received by Lion Global. Based on the documentation, I don't think that's a terribly controversial statement. That's the information the Trustee has to go on. And Mr. Gorkin is saying it was received by Straits Lion Asset Management and the Trustee needs to amend --

THE COURT: So how are we getting personal jurisdiction?

MR. BECKERLEGGE: Over Lion Global?

THE COURT: Yes.

MR. BECKERLEGGE: Because Straits Lion Asset Management became Lion Capital, which was subsequently renamed Lion Global. So they are all one and the same.

THE COURT: So you're going back to that same argument of successor liability that Mr. Gorkin talks about.

MR. BECKERLEGGE: We do, Your Honor. We have no other information to go on. You know, despite Mr. Gorkin and a number of other defendants' representations that the Trustee has everything and this case has been kicking around for over a decade, the reality is the Trustee does not have everything and only has the information that he has.

THE COURT: So what you really need is discovery on this is that you're saying to me.

MR. BECKERLEGGE: We certainly could have discovery on this issue, Your Honor. Discovery would probably then lead to -- I think what Mr. Gorkin was seeking is a motion for amended complaint. So discovery coupled with motion practice. That's a yes, Your Honor.

THE COURT: I'm going into chambers. We'll take a recess.

MR. BECKERLEGGE: Thank you, Your Honor.

(Recess)

THE COURT: We are back. Mr. Gorkin -- I don't see Mr. Beckerlegge. There you are.

Anything else you all wish to add?

MR. GORKIN: I would just like to add one thing, Judge Morris, which is just to clarify what LGI is requesting here. Because I think it wasn't exactly accurate the way that Mr. Beckerlegge put it, which is first and foremost, we think that the complaint should be dismissed with prejudice. But secondarily, as I said several times, if the Court is not inclined to do that, the Trustee really has to make a motion for leave to amend his complaint and to set out what he is actually alleging in the complaint and that there is no basis to go to discovery before that happens because there's no way to determine the relevance of any discovery.

And as I explained during my argument, there is no

fact that, quote, unquote, if proven would then provide the Court a basis for determining that personal jurisdiction exists. We've already said assume, for instance, that what he says in his opposition brief is correct, that LGI is a successor, there's still no legal basis to do it. So what fact is he going to uncover that would then allow this Court to make a conclusion? There's still no law, no basis upon which the Court could assess the significance of that fact.

THE COURT: I believe you've already argued that, Mr. Beckerlegge. Do you have anything else you wish to add?

MR. BECKERLEGGE: I do. The only thing I would add, Your Honor, is that as far as we know, Straits Lion Asset Management was dissolved. So discovery would be interesting in terms of -- and we'd have to think through what that discovery would look like. But we would anticipate that Lion Global employees would be answering for Straits Lion Asset Management.

And also I should add that on that Citco document and Exhibit 5, the addresses are exactly the same. You've got continuity of addresses, you've got continuity of employees. And I know Mr. Gorkin just took himself off of mute, so I know he wants to respond to that. But the reality is we believe Lion Global was the proper party.

THE COURT: Only if you want to add something new, Mr. Gorkin.

MR. GORKIN: I'll just talk about Exhibit 5 very briefly, which is that is a 2009 document. The alleged transfers into Fairfield Sentry happened in March and April of 2005 and the redemption happened in July 2005. Now, the Trustee, in Exhibits 3 and 4, has submitted the contemporaneous 2005 documents for going in, but not for coming out. And that's simply implausible or impossible that the 2009 document saying Lion Global Investors is the entity that received it, because we've submitted certificates of incorporation and name changes from the official government agency in Singapore --

THE COURT: You're repeating yourself.

MR. GORKIN: (indiscernible) until 2008. And this happened in 2005.

THE COURT: You repeated yourself. And I've heard you. So the Federal Rules of Civil Procedure 25(b)(1) states in relevant part, "Parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action. The discovery is not limited to the merits of the case. For example, where issues arise as to jurisdiction or venue. Discovery is available to ascertain the facts bearing on the issue." That's Oppenheimer Fund v. Sanders, United States Supreme Court, 437 U.S. 340.

And the Second Circuit has stated, "A plaintiff

may obtain discovery in connection with issues related to the court's jurisdiction. A court should take care to give the plaintiff ample opportunity to secure and present evidence relevant to the existence of jurisdiction." Haber V. United States, 823 F.3d 746. "If a plaintiff presents factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts between the parties in the forum state, the plaintiff's right to conduct jurisdictional discovery must be sustained." And there is more in that.

From what I've heard today, it's reasonable that we have discovery on this issue. I think I need a scheduling order on what you all are going to do, when and how on discovery. Get together, come back and talk with me on November the 16th with your discovery scheduling order and tell me what you are progressing on. Very good.

MR. BECKERLEGGE: Thank you, Your Honor.

THE COURT: Thank you.

MR. GORKIN: Thank you, Your Honor.

THE COURT: 12-01194, Irving Picard, Trustee, Liquidation of Bernie L. Madoff Investment Securities LLC v. Kookmin Bank. State your name and affiliation.

MR. CIRILLO: Good morning, Your Honor. Richard Cirillo of Cirillo Law Office for Kookmin Bank.

MR. FISH: Good morning, Your Honor. Eric Fish,

Baker Hostetler, on behalf of the Trustee, Irving Picard.

THE COURT: I'm sorry, I accidentally put myself on mute.

Mr. Cirillo, it's your motion.

MR. CIRILLO: Thank you, Your Honor. I imagine you're wondering why I'm here arguing these points after so many arguments and decisions. The reasons are that -- and I'll call Kookmin Bank KB.

KB is a Korean bank. It bought Fairfield shares in 2004 and redeemed them in 2005 and early 2006. The complaint against KB is demonstrably different from those against some of the other defendants in which the plaintiff has made factual allegations that are sufficient under Rule 8A as interpreted by the Supreme Court. It is very unfair to hail KB in court --

THE COURT: Let me -- I don't want to cut you off, but I want you to focus on something. It seems to me that you have a little bit of a new argument concerning customer property and that there is -- and you even state that there's an obvious alternative explanation. Do you want to give that to me?

MR. CIRILLO: Yes, Your Honor. The obvious alternative -- and let me preface that by saying that the courts require that the plaintiff address obvious alternative explanations for a phenomenon that they want to

--

THE COURT: And let me ask you one other question before you begin. Is that not what you argued in another case in front of me? I just want to be clear.

MR. CIRILLO: Yes, it is. But perhaps I didn't -- and that was the Korea Exchange Bank case. And I want to deal with the possibility that I wasn't sufficiently clear in my explanation.

THE COURT: Actually, you were very clear, Mr. Cirillo.

MR. CIRILLO: Well, Your Honor --

THE COURT: Just to be clear, you were very clear.

MR. CIRILLO: Well, I want to argue two points if Your Honor will hear me. One is the personal jurisdiction point, which I think is different for KB. And the other, I want to underscore a point about the customer property issue that I may not have been as clear on. And I understand that this presumes on Your Honor's time. From my point of view, I need to make the best case for each of my clients. And while I can't overly presume on the Court's time or presume at all on the Court's time, I think that the ability to make the case for each client is part of the process.

If Your Honor wants me not to argue the case, then that's a different issue.

THE COURT: I never cut somebody off completely.

I just want you to know you've been heard. You were heard before, and you're heard again. I will let you talk. I'm not the Supreme Court. I don't necessarily hit a buzzer, but I will hit a buzzer if you repeat yourself in the same case. So that's...

MR. CIRILLO: I understand that. And I appreciate Your Honor's indulgence.

On personal jurisdiction, unlike most of the defendants, KB put in a detailed deposition executed on the company's behalf by its officer, Hyung Park. Why did it do so? It wants the Court to understand exactly why the plaintiff is relying on speculative, non-factual allegations. It wants to show that even a minimal Rule 11 pre-suit inquiry could have provided -- would have shown that there is no basis for jurisdiction. But mainly to explode the notion that the Plaintiff's allegations are factual as required by Rule 8(a) and not non-factual. And that is specific to this case.

The requirement of factual rather than other allegations is exactly what Twombly and Iqbal held and many other cases that say that the Court disregards conclusory, speculative, and legal assertions.

The KB complaint insofar as one of the key allegations, if not the key allegation, it uses cookie-cutter language. It is pretty much verbatim tying into

Judge Lifland's metaphor in BLI about knowingly tossing a seed and collecting the fruit.

In BLI, however, Judge Lifland was very explicit that the defendant have knowledge, be alleged to have knowledge of BLMIS's role in New York in the investment. And to underscore that, at 480 B.R. 517, he says, "BLI invested tens of millions of dollars in Fairfield Sentry," and here's the key part, "with the specific purpose of having funds invested in BLMIS in New York." Without knowledge, you can't have a specific purpose.

He also said, same page, "BLI purposely availed itself of knowing, intending, and contemplating that the substantial majority of funds (indiscernible) in Fairfield Sentry would be transferred to BLMIS in New York." Obviously those key aspects of BLI would not apply and the metaphor would not apply if there was not a sufficient allegation of knowledge. It is that specific factual allegations that are missing from the KB complaint.

In the BLI case, the judge pointed to -- Judge Lifland pointed to hard facts that were alleged. And specifically that BLI hired Union Securities to conduct due diligence and that on BLI's behalf, Union Securities learned that Fairfield Sentry, and I quote, "Strategy is executed by BLMIS", that the private placement memorandum provided to Union Securities highlighted BLMIS's central role in

Fairfield Sentry's investment strategy, and that the PPM explicitly stated that Fairfield was required to invest at least 95 percent of its assets in the split strike conversation strategy utilized and controlled by BLMIS in New York.

The PPM that Judge Lifland cited was the 2006 version. For purposes of this motion, Mr. Fish and I agreed that KB allegedly received and read the 2004 version, which is very different. And we'll see in a moment why that difference is crucial.

The Park declaration explains why KB did not know that BLMIS and Madoff were involved. And it gives two reasons. One is it did not need to know those facts or anything about Fairfield Sentry in order to carry out its limited job. The second was that there is nothing in the 2004 PPM, which is an exhibit to the Park declaration, or anything else KB allegedly received. Why is that relevant? The Plaintiff argues that knowledge is alleged because it is plausible that KB would have that knowledge as though everybody had that knowledge. He uses these exact words. He says, "The Defendant makes the implausible claim that it did not know that BLMIS or Bernie Madoff had anything to do with Fairfield or its shares." That's Page 13 of the opposition memorandum.

This exposes that -- this exposes that the

allegation knowledge is not a factual allegation, but conjecture because it's based on the notion that the allegation of knowledge is that non-knowledge is implausible.

Common experience, our experience shows that it is not implausible to limit our knowledge to what we need to know to get through our job and our lives. Lack of knowledge is not implausible. For example, we know that bond traders rely heavily or exclusively on bonds ratings and market prices without investigating what the issuer does or with whom it is associated. It's not necessary to know. And I don't want to be cute, but the list of things that people don't know because they don't need to know is somewhat surprising. And these are all from randomized surveys from Pew Research or the National Science Foundation or Fifth Third Bank. These are randomized surveys, show that a quarter of Americans believe that the polio vaccine was --

THE COURT: I don't think we can rule on that, and I don't think that's relevant to your argument.

MR. CIRILLO: Well, okay. I won't go through them.

THE COURT: Stay with relevance.

MR. CIRILLO: What is relevant to the argument is that people don't know things that other people assert they

know or should know.

So what does the complaint actually say? It says KB knowingly directed funds to be invested with New York-based BLMIS through Fairfield Sentry and knowingly received subsequent transfers from BLMIS by withdrawing money from Fairfield Sentry. There are no facts to support that alleged in the complaint, just the word knowingly --

THE COURT: Okay, but that is alleged and that's -- we are at alleged stage. We are not at fact stage. That's trial stage.

MR. CIRILLO: No, Your Honor. I'm sorry. I have to disagree. That's exactly what the difference between Rule 8(a) and saying something that is conjectural, speculative, and a non-factual allegation. The Supreme Court went through this over and over again in Twombly and Iqbal. And I cite them because they are the Supreme Court. I could cite a hundred other cases that say just saying it's so doesn't make it a factual allegation that shows the Plaintiff is entitled to relief. If that were the case, if it were sufficient just that the plaintiff said it --

THE COURT: Mr. Cirillo, that's --

MR. CIRILLO: (indiscernible) plaintiff could say anything --

THE COURT: I must have misspoke. Because all we care about is that the Trustee alleges that they knew and

that they have facts to support that. Now, then you move on to whatever you want to say. I'll stay out of your --

MR. CIRILLO: Well, again, Your Honor, I disagree with that statement of the law.

THE COURT: Okay. Okay.

MR. CIRILLO: It is not sufficient under the Supreme Court, Second Circuit, Southern District and bankruptcy court law to simply say knowingly. Judge Lifland in BLI had specific facts. In the Dorchester case that Your Honor cites, the Court had a specific fact. And that specific fact -- and it discusses it over and over again -- that specific fact was the plaintiff alleged that the defendant had signed a consent to New York jurisdiction. The defendant said, well, that's a fraudulent document. And the court said, well, I can't rule on that on this motion, but it is a factual allegation. And the word "knowing" or "knowingly" is not a factual allegation. And if I can't persuade the Court of that difference between a conclusory, unsupported allegation, then I really should stop. Because the second point is similar. And that is that the only possible factual support for the word knowing or knowledgeable or knowingly is that KB received the 2004 PPM. That PPM is in the record. It doesn't say anything about BLMIS or Madoff being involved in trading or executing the strategy.

To the contrary, it says 17 times that a Bermudian company in Hamilton, Bermuda did that. It doesn't mention Madoff at all. It mentions BLMIS only as a sub-custodian. That has nothing to do with trading or managing the strategy of trading. It says nothing at all about KB having any awareness that BLMIS or Madoff had any involvement. And as the Park declaration -- well, Exhibit 1 is that PPM which Your Honor can refer to. But nothing in it supports -- or the word knowingly. And therefore, there is no knowing and no factual allegation required, as required by the Supreme Court.

One of the other things. I've argued to Your Honor and I still adhere to the view that the use of correspondent banks cannot be a basis for jurisdiction alone. That's Amigo Foods, the Court of Appeals in New York said that. They cannot be used as a basis of personal jurisdiction unless the plaintiff alleges factually that the defendant that he seeks jurisdiction over both actively participated in an illegal scheme and that the account was indispensable to carrying it out. That's what Licci and Al Rushaid said in the -- by the New York Court of Appeals, including the Licci decision of the Second Circuit following the New York Court of Appeals answering its certified question.

Neither of these elements is sufficient in itself,

nor is it sufficient in a totality of circumstances. I could give an example, but I think that would overly presume on the Court's time.

The Plaintiff says that that KB executed a subscription agreement and that its execution of the subscription agreement was a purposeful availment of the privileges of New York. Well, that just isn't the case on the document itself, which is Park Exhibit 2 and Fish Exhibits 2 and 3. The document does not say that KB may bring an action against Fairfield in New York. It doesn't say that either Fairfield or KB must bring an action. It is not an exclusive jurisdiction provision. It merely says that if KB sues Fairfield with respect to an issue that is not before the Court -- that is the purchase of shares. But if it does, Fairfield has the right to drag it back into New York court. That's all it says.

That is not KB's purposeful availment of New York Jurisdiction. If it's anybody's, it's Fairfield's purposeful jurisdiction of New York. It is not at all clear that Fairfield would use that option to bring it back. And as Your Honor knows, it sued some of the defendants in the BVI rather than in New York, not even itself taking advantage of its own availment of the New York (indiscernible).

The Plaintiff says that reading the PPM, one would

know that the split strike conversation strategy involved New York securities, U.S. securities. That isn't a relevant contact. It was not KB that was involved in U.S. securities, it was BVI, a BVI company, Fairfield. It was not relevant any more than it's relevant where car parts were manufactured if you buy the car in Korea. There is no allegation and it is not a fact that Fairfield was a subsidiary or controlled by KB. KB was at most a record shareholder of Fairfield Sentry. Therefore, Walden -- Walden v. Fiore, Supreme Court, precludes relying on a third party's actions in connection with a personal jurisdiction decision on a long arm situation such as this. It just is not a relevant contact under the Supreme Court cases. To say otherwise by the Plaintiff is just ipse dixit. It is not a factual allegation.

All right, turning to the customer property. And I know I did not persuade you the last time. And as I said, I may have been unclear. But I would like to use this example to illustrate what I'm talking about.

Suppose a plaintiff has a bank account. And suppose a defendant makes a payment to a third party. The bank account is what BLMIS has, the payment to the third party is BLMIS's payment to Fairfield.

Now the plaintiff sues the defendant. The complaint alleges --

THE COURT: Would you just stick to the facts instead of --

MR. CIRILLO: These are the facts. These are the facts --

THE COURT: You keep saying suppose.

MR. CIRILLO: These are the facts abstracted. Because what the Plaintiff is alleging is that the payment to the third party either came from the Plaintiff's bank account or it came from another source. That's what the Plaintiff in my example said, and that's exactly what the Trustee is saying in the case against KB.

These are two equal possibilities. Therefore, one is not more plausible than the other. Neither enjoys an inference of plausibility. The complaint says they are two even-steven possibilities. Why is that the case? As Your Honor has held, this is one big case. All of the adversary proceedings are part of it. As Your Honor knows, the Plaintiff has made judicial admissions in this case in the form of its other complaints in this case where they allege a much greater amount of money being paid out by Fairfield than being paid by BLMIS to Fairfield. That means that either the Defendant, KB here, got its money from BLMIS, or it got its money from another source. And this is --

THE COURT: But this is the same argument you had before about -- okay. It's the same argument you --

MR. CIRILLO: Well, yeah. It doesn't make what I said before incorrect. I just want to be sure for KB that I have made my position clear and I've made a record of my position.

THE COURT: Okay.

MR. CIRILLO: So I would ask Your Honor to read Twombly and Iqbal for a thousand-one-hundred times. I know you've read it many times before. They dismissed the actions before them. They are exactly on point with this argument about KB. And they dismissed the complaints before them, and I asked the Court to dismiss the KB complaint.

I rest on my opening and reply brief for the other points that we raised for dismissal. Thank you.

THE COURT: Thank you very much. Yes, sir, Mr. Fish.

MR. FISH: Good morning, Your Honor. I plan to spend most of my time on the personal jurisdiction issue. But I just want to touch briefly on the customer property issue that Mr. Cirillo was just talking about first. And I'll just say there's nothing about the allegations regarding Kookmin Bank's receipt of customer property in this case that's different from the other cases in which his argument has been rejected. The trustee's allege the relevant pathways in Exhibits B and C to the complaint. In fact, Exhibit C includes more than 30 transfers from

Fairfield Sentry to Kookmin Bank. Nothing more is required at this time. So unless Your Honor has any questions, I will move on to personal jurisdiction.

THE COURT: I do not. Thank you.

MR. FISH: So the totality of the circumstances shows that personal jurisdiction is more than appropriate here. All of Kookmin Bank's arguments regarding the lack of jurisdiction are rebutted by the Trustee's allegations and arguments in the Trustee's opposition. And Kookmin Bank's arguments have been rejected by this Court in previous subsequent transfer cases before Your Honor.

First, the Trustee has properly alleged that Kookmin Bank purposefully availed itself of the privileges of conducting activities in the U.S. and New York specifically. The Trustee alleges that Kookmin Bank invested in Fairfield Sentry to gain access to BLMIS, which is a plausible allegation when taken together with the allegation that 95 percent of Fairfield Sentry's assets were invested in BLMIS. And again, as Mr. Cirillo mentioned, this is a similar allegation that's been accepted by the Court in other cases. And although they have a declaration -- I'll touch on that briefly in a few minutes. But it's undisputed that -- you know, whether they new or not that it was Madoff -- and it seems implausible that they didn't. But whether they knew or not, it's undisputed that Kookmin

Bank used a New York bank account to receive transfers, the very transfers that at issue in this case, and also had one subscription agreement where they used a New York bank account to pay the subscription fees or to pay into Fairfield Sentry.

Second, it's not disputed that Kookmin Bank signed a subscription agreement. In fact, they signed three of them agreeing to jurisdiction in New York and the application of New York law. And third, it's not disputed that Kookmin Bank received a private placement memorandum outlining the New York-centric nature of the investment and the funds being custodied with Madoff. In fact, they refer to the same PPM, private placement memorandum, that Mr. Cirillo discussed in the Korea Exchange Bank case. It's the same one that he's bringing forward to the Court here.

So these contacts are not random, gratuitous, or attenuated. And the Trustee's allegations are not conclusory. Rather, the Trustee has made a prima facie showing of purposeful availment. And as in other cases, these claims arise out of or relate to Kookmin Bank's conduct in the forum and it's reasonable to confer jurisdiction under the circumstances.

And the arguments that Kookmin Bank makes in its motion are the same or similar to the other motions before Your Honor. And there's really no reason to stray from

prior opinions -- prior decisions, either factually or legally. And Kookmin Bank's arguments should similarly be rejected.

So I want to just touch briefly on this declaration that Kookmin Bank submitted because it rebuts the complaint allegations that the -- that Kookmin Bank purposefully invested in Fairfield Sentry to get to BLMIS. But Kookmin Bank's argument is implausible in light of BLMIS's Central role in the investment and the fact that they argue in their papers that they were investing as a trustee for various trusts. And notably, they don't say anything in their papers about the intention of the trustee -- of the trust, I should say. It was clearly to invest with BLMIS through Sentry. And under New York Law, as we note in our opposition in Footnote 3, the Trustee of a trust is responsible -- and in fact under New York Law the trustee is the proper party to sue. And beyond that, the subscription agreements, the three subscription agreements also specifically state that if a subscriber is signing as a trustee or agent or nominee or for somebody else, it "agrees that the representations and agreements herein are made by subscriber with respect to itself and the beneficial shareholder."

So in any event, the statement that Kookmin Bank placed money into Fairfield Sentry without knowing the true

purpose of the investment is implausible in light of the Second Circuit's opinion in In re Picard. And I'll quote it again as I did in the Korea Exchange Bank argument. When these investors chose to buy into feeder funds that placed all or substantially all of their assets with Madoff Securities, they knew where their money was going. And that's 917 F.3d 85, 105 (2d Cir. 2019).

So I also want to talk about the declaration itself. Because the declaration that's submitted, it's incomplete and unreliable. And notably, the declaration is not made on personal knowledge of the facts. In fact, it's made on personal knowledge "as informed by review of KB corporate records and discussions with KB personnel." And that's in Paragraph 1 of the declaration.

In other words, the declaration appears to be based on Mr. Park's internal investigation as opposed to personal knowledge. And that might be why there are a couple of errors in the declaration. For one, they only attach one of the subscription agreements. And although the form is similar to others, the banking information for one of the declarations that I submit in my declaration shows that at least one subscription agreement uses a New York bank account to both subscribe and redeem shares from Fairfield Sentry. And that's not noted in the declaration.

And number two, the October 2004 private placement

memorandum attached to the Park declaration can't be the one that Kookmin Bank actually received when it signed the subscription agreements because that PPM is dated after the time the subscription agreements were signed in April of 2004.

So I know Mr. Cirillo said that we agreed that this would be the PPM, but I don't necessarily agree that that would be the PPM that they received. Perhaps some of the language might be the same, but the Trustee doesn't know what PPM -- what private placement memorandum that Kookmin Bank actually received, because it had to have been one that came before the one that Mr. Park attaches to his declaration. But regardless, as a mentioned before, regardless of the declaration, even if it's all true, you can't get past the New York bank accounts. All three subscriptions -- all three subscription agreements, at issue listed Deutsche Bank Trust Company, America's Bank Account for the receipt of redemption payments. And Exhibits 4, 5 and 6 to my declaration also show that Kookmin Bank used these bank accounts to receive the transfers at issue. Those are examples of the transfers that went into those accounts. And in fact the Trustee is a aware of at least 30 transfers that went from Fairfield Centuries HSBC account in New York to Kookmin Banks, Deutsche Bank account in New York. And as I mentioned before, one of the subscription

agreements uses the New York bank account to subscribe into Fairfield Century.

So the circumstances surrounding Kookmin Bank's use of the New York accounts show why Liche and Case is conferring jurisdiction based on the use of correspondent accounts is applicable here. And also Mr. Cirilo doesn't mention the recent Arcapita case, which Your Honor cited in your Korea Exchange Bank case, which it -- this is not a case involving terrorism or, you know, the unlawfulness that Mr. Cirillo suggests is necessary; rather it was a case in which the designated correspondent account was used to receive fund transfers from the debtor. And although the debtor chose to use US dollars to effectuate the investment, the defendant "could have avoided the United States entirely by routing placements through correspondent accounts anywhere in the world". And that's 640 BR at Page 618. This is Bahrain Islamic Bank v Arcapita Bank 640 BR 604, May 22, 2022.

And so the same can be said here that Kookmin bank entered into agreements with Fairfield Century in which they used the New York bank accounts. Kookmin Bank chose to enter into these agreements. They didn't have to, but they chose to and they used New York bank accounts for this. And I'll just quote, Your Honor's language in the Korea Exchange Bank case and this is the Westlaw version, which is 2022 WL

4371908 at Page *4, where defendant chooses to use the United States bank accounts to receive funds exercising personal jurisdiction for the defendant for causes of action relating to those transfers is constitutional.

So -- and going back to the PPM, the Private Placement Memorandum, even if the October 2004 PPM is the only one that they saw or it seems to be the only one that they have found in their investigation, even though we believe they must have gotten one before that; there's plenty of information in that PPM showing that this is a New York Centric Investment, and it does mention BLMIS and again, it's the same one from the Korea Exchange Bank case. And you know, on Page 15 of the PPM, currently, BLM has approximately 95 percent of the funds assets under custody.

On Page 8, it discusses the split strike conversion strategy and the purchase of S&P stocks. Page 1 and 10, it talks about the initial investment and initial offering price in US dollars. Page 20, maintains assets in US dollars. Then VNAV is determined in US dollars. There's a mention of US counsel located in New York. There's a mention of trade risks involving US Government activities on Page 16. There's a mention of legal matters having been passed in the United States by counsel in New York. That's at Page 33. So, even if -- even if Kookmin Bank is accurate in saying they had no idea this was Madoff, the October 2004

PPM, and even if that's the one that they had, again, it's questionable, but it's more than sufficient information to show that they understood Fairfield Century to be a New York based investment and the Madoff held almost all of the assets.

And finally, the subscription agreements, Your Honor. They have the form selection clause and it's one more contact, again we're not saying that this form selection clause automatically confers jurisdiction, but it's one more contact that shows this was a New York based investment and that Kookmin Bank knowingly invested in a New York based fund. And not only that, but it also shows that it would be fair to confer jurisdiction in this case. They agreed to the form selection clause in their -- in their subscription agreements. And so under the totality of the circumstances, Your Honor, the jurisdiction here, there's plenty of contacts, it's fair and there's not much different here than in any other cases other than a questionable declaration. But even if that declaration is accepted, there's -- there's still jurisdiction here. And unless, Your Honor, has any questions for me, I'll --

THE COURT: I do not. Mr. Cirillo, anything you wish to add?

MR. CIRILLO: Yes, a few things. The Mr. Fish says we can't get past the New York correspondent accounts.

We appear to have a disagreement over whether the law of the State of New York does or doesn't limit the jurisdictional significance of New York bank accounts. The Second Circuit made clear in Liche that New York law applies and that's the Touchstone and the Court of Appeals -- the New York Court of Appeals has never backed off the notion that it has to be an active participant in an illegal transaction. And the reason is otherwise in innocent transactions that occur daily and trillions of dollars would then suddenly be suddenly sucked into New York courts by jurisdiction, which is not appropriate or constitutional. The -- indeed it is such a mindless decision to designate a New York correspondent account that it is advantageous. It is trivial. It is irrelevant.

The referent -- the only reference in the PPM, and I'm a little surprised because Mr. Fish and I agreed that whatever, and it's in the brief, that whatever document PPM is referenced in the subscription agreement and assuming that, in fact, that was received, that the contents -- we agreed the contents were no different -- for the purposes of this motion, were no different from the October 2004. And so to argue -- to put -- to cast doubt that there might have been more is excluded on this motion. And the only reference in that to blame us and there was no reference to Madoff, is as a sub custodian of assets. And a custodian is

just like the bank that has safety deposit boxes that people put assets in. It has no active role in how those assets arise and so knowing someone is a sub custodian is of no value in knowing who is executing transactions.

As to the probity of the Park declaration, the basis for Ms. Park's knowledge is exactly the same as in a 30b6 deposition. People don't know, certainly after 18 years, individually, what happened in a corporation like Kookmin Bank. So how do they testify? They learn from records and from people what they can and provide the testimony in that fashion. There's nothing wrong with that and the supposed errors that Mr. Fish said are not errors at all, and they're not inconsistent at all with the declaration.

The recitation about the declaration that Mr. Fish gave significantly omits the fact that as a Trustee under Korean law, the -- the only role that the Trustee had was to execute transactions. He doesn't make any reference to the asset manager who did all of the decision making on what to buy, what to sell, when to buy, when to sell. That is crucial and New York law, in fact, does not apply as to whether a beneficial owner or an asset manager can be sued. In fact it is New York law at (indiscernible) includes the choice of law, provisions of law, and in this case they point to Korean law, and therefore to argue that under New

York law, they couldn't have sued the beneficial owners or the asset manager is simply wrong.

Other than that, Your Honor, I rest on what I said earlier. I think, Your Honor, gets it and I need to persuade, Your Honor, to take a different course from the course you've taken on these two points in the past. I recognize that that is an uphill battle and I hope that Your Honor, will consider these arguments as good faith based, and based on a solid grounding of controlling law from the United States Supreme Court, Second Circuit and the New York Court of Appeals. That's all I have, thanks.

THE COURT: Very good. Mr. Fish, any quick answer?

MR. FISH: Sure. Just a couple of minor points because I don't want Mr. Cirillo to be upset with me about the Private Placement Memorandum issue. As I said during the argument, we don't know what PPM Kookmin Bank received, but you know, I told Mr. Cirillo, that we can assume for the sake of the argument that they received this October 2004 PPM and that if they received an earlier one, perhaps the language may have been similar. But again, we don't know what they received and I think that's the point. But regardless of which one they received; I think the 2004 version that they submit in their papers is sufficient. Also there -- Your Honor, there's no argument in the papers

regarding the use of Korean Law. You know, I think that's a red herring. I think that's -- that maybe, perhaps that's an issue more appropriate for discovery and Kookmin Bank's role in the investment is obviously a fact question and we can explore that during discovery as well. And that's all I have to say, Your Honor.

THE COURT: Very good. You will obviously receive a written opinion.

MR. CIRILLO: Thank you.

MR. FISH: Thank you, Your Honor.

MR. CIRILLO: Appreciate it, Your Honor.

THE COURT: Thank you. Chambers.

(Whereupon these proceedings were concluded at 11:53 AM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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